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Nos. 01-1118 and 01-1119

In The
Supreme Court of the United States

JOSEPH SCHEIDLER, et al.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,

Respondents.

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICUS CURIAE* AMERICANS UNITED FOR LIFE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS[1]

Americans United for Life (AUL)[2] is a national, non-profit public interest legal and educational organization that advocates, among other things, that the practice of human abortion harms the physical and social well-being of women, ends the life of unborn children, and contradicts the highest moral standards of American life.

While working primarily in the courts, legislatures and outlets of public education and media, AUL believes that free, open and robust public social debate on the issue of abortion must be allowed unimpeded by fear of meritless and costly litigation and the threat of draconian damage awards.

If left standing, respondents' flawed contention, that racketeering liability predicated on Hobbs Act[3] extortion, may be imposed on social protests that merely cause a "loss" to an object of the protest, without a concurrent "obtaining" by a protester or third party, will virtually shut down all public debate, including legitimate protected speech, on the most crucial social issue of our generation.

Because stifling free and vigorous public protest on the merits of legalized abortion undercuts and hinders

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[1] This brief is filed with the written consent of the parties. Letters of consent have been filed with the Clerk of this Court.

[2] Attorneys from Americans United for Life (not the undersigned) and Professor G. Robert Blakey have previously represented the petitioners in this litigation. Further, the Alliance Defense Fund (ADF), a non-profit public interest organization, located in Scottsdale, Arizona, partially funded the preparation of this brief.

[3] *See* 18 U.S.C. § 1951 (2000).

public opposition to abortion, AUL's efforts to promote public policy that defends human life by impacting the broader culture are at the very least indirectly and adversely affected. Consequently, AUL files this amicus brief in support of petitioners, urging that the lower courts' improper application of the Hobbs Act be reversed.

SUMMARY OF ARGUMENT

The respondents' theory of recovery under the Racketeer Influenced and Corrupt Organizations Act (RICO)[4] – that their mere loss of property is equivalent to petitioners obtaining it – rests on an interpretation of Hobbs Act extortion that is contrary to the express language of 18 U.S.C. § 1951, inconsistent with this Court's precedent, and contrary to common law. Respondents' interpretation and some lower courts, including the decisions below, have abolished the "obtaining" element of Hobbs Act extortion, or have essentially abolished it by replacing it with novel meanings.

The abolishment of the "obtaining" element of Hobbs Act extortion is based on a theory that takes correct legal propositions – that an extortionist need not personally benefit from the extortion, and that the extorted property need not be tangible – and mistakenly links them with an erroneous proposition – that the gravamen of extortion is loss to the victim. Some courts have used this erroneous theory to hold defendants liable under the Hobbs Act when the defendants have not obtained, attempted to obtain, or

[4] *See* 18 U.S.C. § 1961-64 (2000).

conspired to obtain property. Curiously, these decisions arise in only one unique context: when the plaintiffs or victims are abortion clinics, abortion providers, or abortion advocates, as in this case.

Simply depriving respondents of property, or the use of property, does not equate with the defendants' obtaining of that property. Since petitioners or their designees never "obtained" property, tangible or intangible, no violation of the Hobbs Act occurred and, therefore, no violation of RICO occurred. Respondents and others similarly situated have adequate remedies for private harms, including trespass and vandalism, available to them under state law.

ARGUMENT

I. THIS COURT'S DECISION IN *EVANS V. UNITED STATES* COMPELS THE CONCLUSION THAT HOBBS ACT EXTORTION REQUIRES "OBTAINING" OF PROPERTY

This Court confirmed the basic principles of statutory construction in *Evans v. United States*, 504 U.S. 255 (1992), where this Court agreed that "extortion" under the Hobbs Act must be interpreted in light of its common law meaning. Recognizing that Congress "intended to adopt" the common law meaning of extortion in the Hobbs Act, this Court confirmed:

> "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will

> convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them."

Id. at 259-60 (*quoting Morissette v. United States*, 342 U.S. 246, 263 (1952)).

This Court also acknowledged that Congress adopted its particular definition of the Hobbs Act from New York law and the Field Code, the forerunner to New York law, both of which defined extortion as "the obtaining of property from another . . ." *See Evans*, 504 U.S. at 263 n.9. Under New York Law, "[l]arceny by extortion requires the taking of property." *Printers II, Inc. v. Professionals Pub. Inc.*, 615 F.Supp. 767, 773 (S.D.N.Y. 1985), *aff'd on other grounds*, 784 F.2d 141 (2d Cir. 1986); *see also United States v. Enmons*, 410 U.S. 396, 406 n.16 (1973) (*quoting* New York law[5] which included the "obtaining" element); *Viacom Int'l, Inc. v. Icahn*, 747 F.Supp. 205, 210 (S.D.N.Y. 1990) (*quoting* 18 U.S.C. § 1951) (definition of extortion includes obtaining), *aff'd on other grounds*, 946 F.2d 998 (2d Cir. 1991), *cert. denied*, 502 U.S. 1122 (1992). The Field Code of 1865 defined extortion as "the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right." *Evans*, 504 U.S. at 263 n.9 (*citing* Commissioners of the Code, Proposed Penal Code of the State of New York, § 613 (1865)).

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[5] N.Y. Penal Law § 850 (1909).

By statute, Congress has expanded the early meaning of common law "extortion" to include the actions of private parties (i.e., not just actions under color of official right). *Id.* at 261. But Congress retained the universal common law meaning of "extortion" as an offense that involves a **taking** or **obtaining** of property. *Id.* at 260-61. There is no basis for a finding to the contrary.

II. LOWER COURTS HAVE IMPROPERLY ABOLISHED THE REQUISITE ELEMENT OF "OBTAINING"

Disregarding the plain language of the Hobbs Act, the common law, and *Evans*, some lower courts have abolished the element of "obtaining," or have essentially abolished it by replacing it with novel meanings.[6] Many courts have misconstrued *United States v. Green*, 350 U.S. 415, 420 (1956), where this Court said "extortion as defined in the statute in no way depends upon having a **direct** benefit conferred on the person who **obtains** the property." (emphasis added). In *Green*, this Court addressed the validity of an indictment of a union official whose threats served to obtain money and jobs for employees. *Id.* at 417. This Court in no way suggested that obtaining is not an element of Hobbs Act extortion; rather, it simply concluded that a defendant who obtains or attempts to obtain property for the benefit of a third party falls within the scope of

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[6] For example, in this case, the district court judge instructed the jury that the "obtaining property" element of the Hobbs Act was satisfied by a showing that petitioners (or others associated with Pro-Life Action Network (PLAN)) "caused women, clinic doctors, nurses, or other staff or the clinics themselves to **give up** a property right" where "property right means **anything of value**, including a woman's right to seek services from a clinic." (Tr. 4945).

Hobbs Act extortion. *Id.* at 420. Nonetheless, a number of courts have misconstrued *Green* to mean that a defendant need not "obtain" or "attempt to obtain" property **for anyone** under the Hobbs Act.

In an early and seminal example of this error, after quoting extensively from *Green*, the court in *United States v. Provenzano*, 334 F.2d 678, 686 (3d Cir. 1964), *cert. denied*, 379 U.S. 947 (1964), improperly stated that "the gravamen of the offense [of extortion] is loss to the victim." This is manifestly false. The essence of extortion is the **acquisition** of another's property. *Enmons*, 410 U.S. at 400, 406 n.16 (1973); *United States v. Nardello*, 393 U.S. 286, 289-90, 295-96 (1969). *Accord*, *Rex v. Burdett*, 91 Eng. Rep. 996, 997 (K.B. 1696) ("the extorsive agreement . . . is not the offence, but the taking . . . ."); *Commonwealth v. Pease*, 16 Mass. 91, 93-94 (1819) ("the essence of the offence . . . is the receiving"); *United States v. Panaro*, 266 F.3d 939, 943 (9th Cir. 2001) ("[U]nder the Hobbs Act, extortion, which is a larceny-type offense, does not occur when a victim is merely forced to part with property. Rather, there must be an "obtaining": someone – either the extortioner or a third person – must receive the property of which the victim is deprived.").

The *Provenzano* court mistakenly linked an accepted legal proposition – that an extortionist need not personally benefit from the extortion – with an erroneous one – that the gravamen of extortion is loss to the victim.[7] Not only is

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[7] *See* Brian J. Murray, Note, *Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 Notre Dame L. Rev. 691, 717-19 (1999).

the *Provenzano* assertion that the "gravamen of the offense" is "loss to the victim" false, it is also mere dictum.[8] A careful review of the actual holding in *Provenzano* supports the proper understanding that for extortion to be committed, someone **must actually obtain** property, although the property need not constitute a gain to the defendant.[9] Furthermore, the *Provenzano* court inappropriately fashioned the "loss to the victim" dictum from a portion of a jury instruction in a New York state criminal case, *People v. Fichtner*, 118 N.Y.S.2d 392, 395 (N.Y. App. Div. 1952). The propagation of the "loss to the victim" dictum is a clear misreading of *Fichtner*, a case which teaches that to be convicted of extortion, property must be "collect[ed]" (*i.e.*, obtained), but need not be retained by the defendant.[10] Unfortunately, a number of

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[8] Specifically, the court's holding was "that it is not necessary to prove that the extortioner himself, directly or indirectly, received the fruits of his extortion or any benefit therefrom. The Hobbs Act does not require such proof. **It is enough that payments were made at the extortioner's direction to a person named by him.**" *Provenzano*, 334 F.2d at 686 (emphasis added). Clearly, the court expressly recognized that property must be "obtained" by someone for "extortion" to have occurred. Moreover, following accepted principles of statutory construction, the *Provenzano* court relied on two New York state court decisions that affirmed convictions for extortion where a third party, not the extortioner, "obtained" money from the victim. *See People v. Fichtner*, 118 N.Y.S.2d 392 (N.Y. App. Div. 1952) (affirming convictions of two store clerks who extorted $25 from a customer and gave the money to their employer); *People v. Scheppa*, 67 N.E.2d 581 (N.Y. 1946) (affirming conviction for extortion where money was turned over to alleged co-actor).

[9] *See* Murray, *supra* note 7, at 718.

[10] In *Fichtner*, the defendants were convicted of extorting $25 from a customer by threatening to charge him with shoplifting. The money was collected from the customer, rung up on the cash register and placed into company funds. The defendants did not retain any of the

(Continued on following page)

courts,[11] including the Seventh Circuit,[12] have cited, relied on, and adopted the *Provenzano* court's flawed dictum.

Importantly, in each case adopting this dictum, the defendant in fact "obtained" property, attempted "to obtain" property, conspired "to obtain" property, or "obtained" property to be directed to a third party. *See United*

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money. At trial, the defendants argued that they were not guilty of extortion since they had not gained any benefit by their actions and that they had reasonably believed that the victim had stolen goods worth $25 from the store. The trial court charged, in part, that "it is immaterial that the person who obtains the money retains no part of the proceeds; the gist of the crime is the loss of money by [the victim] by reason of a criminal act on the part of the defendants." *Id.* at 395 (emphasis added). The defendants were convicted and their convictions were upheld on appeal. While affirming that extortion does not require a defendant to retain property he obtained by extortion, the appellate court implicitly rejected the portion of the jury charge that stated that "the gist of the crime is the loss of money by [the victim]." Rather than finding that extortion statutes were intended to prevent a loss to the victim, the court specifically found that "the extortion statutes were intended to prevent the **collection of money**." *Id.* at 395-96. (emphasis added). The "collection" of money is obviously tantamount to "obtaining" it.

[11] *See, e.g., United States v. Hyde*, 448 F.2d 815, 843 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972); *United States v. Frazier*, 560 F.2d 884, 887 (8th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *United States v. Santoni*, 585 F.2d 667, 673 (4th Cir. 1978) (*quoting Frazier*, 560 F.2d at 887), *cert. denied*, 440 U.S. 910 (1979).

[12] In *United States v. Rindone*, the Seventh Circuit stated that "a [Hobbs Act] violation is complete when one attempts to induce a victim engaged in interstate commerce to part with property." 631 F.2d 491, 493 (7th Cir. 1980) (*citing, inter alia, Frazier*, 560 F.2d at 887). *See also United States v. Lewis*, 797 F.2d 358, 364 (7th Cir. 1986) ("loss to the victim is the gravamen of the offense"), *cert. denied*, 479 U.S. 1093 (1987); *United States v. Stillo*, 57 F.3d 553, 559 (7th Cir. 1995) ("[a] loss to, or interference with the rights of, the victim is all that is required [for a Hobbs Act violation]") (*citing United States v. Lewis*, 797 F.2d 358, 364 (7th Cir. 1986)), *cert. denied*, 479 U.S. 1093 (1987).

States v. Provenzano, 334 F.2d 678, 684-86 (3d Cir. 1964) (defendant directed payments to a third party); *United States v. Hyde*, 448 F.2d 815, 820 (5th Cir. 1971) ("defendants threatened certain small loan companies that unless pay-offs were made to them they . . . would put the companies out of business"); *United States v. Frazier*, 560 F.2d 884, 885 (8th Cir. 1977) (defendant was convicted of attempting "to obtain money from the First National Bank"); *United States v. Santoni*, 585 F.2d 667, 670 (4th Cir. 1978) (defendant received payoffs in order to secure subcontracts for a third party); *United States v. Rindone*, 631 F.2d 491, 492 (7th Cir. 1980) (defendant accepted payoffs for granting electrical work permits); *United States v. Lewis*, 797 F.2d 358, 363 (7th Cir. 1986) (defendant demanded that victim wire $1 million to a third party's bank account);[13] *United States v. Stillo*, 57 F.3d 553, 559 (7th Cir. 1995) (testimony given that defendant received a cash payment).

III. CASES INVOLVING ANTI-ABORTION PROTESTERS FURTHER ERODE THE COMMON LAW REQUIREMENT OF AN "OBTAINING"

Relying on *Provenzano* and its progeny, lower courts have continued to erode and distort the statutory and

[13] Evidence of a demand to obtain property is sufficient proof to sustain conviction for attempted extortion. *See Rindone*, 631 F.2d at 493 ("sufficient evidence to prove an attempt to extort has been found even where the payment demand was made but the victim refused to comply"). Here the record contains no evidence of the petitioners' demanding any payments or property of any type or nature.

common law definition of extortion, specifically by undermining the requirement of an "obtaining" of property. Some courts have actually held defendants liable under the Hobbs Act when the defendants have not obtained, attempted to obtain, or conspired to obtain property. Curiously, these cases thus far arise in only one unique context: when the plaintiffs or victims are abortion clinics, abortion providers, or abortion advocates,[14] as in this case.

This greatly expanded and flawed theory of liability was first adopted in *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989), where anti-abortion protesters were found liable under civil RICO. This decision was wrong. In finding the defendants liable under the Hobbs Act and subsequently under RICO, the court failed to determine whether the defendants had "obtained" anything through their actions,[15] blatantly ignoring the express statutory language for extortion and the common law history of the term. Inexplicably, despite

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[14] *See, e.g.*, *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989), *cert. denied*, 493 U.S. 901 (1989); *United States v. Arena*, 180 F.3d 380 (2d Cir. 1999), *cert. denied*, 531 U.S. 811 (2000); *Libertad v. Welch*, 53 F.3d 428 (1st Cir. 1995); *Palmetto State Medical Center v. Operation Life Line*, 117 F.3d 142 (4th Cir. 1997).

[15] The defendants picketed the Northeast Women's Center in Philadelphia, tried to block access to the facility, and attempted to dissuade patients from entering the facility. They also chanted, leafletted, and demonstrated in public fora, activities clearly protected under the First Amendment. After nine years of protests, the facility lost its lease and moved to a second location where the protests continued. *McMonagle*, 868 F.2d at 1345-46. To meet their burden at trial, the facility introduced evidence of protected First Amendment conduct and four instances of trespass. *Id.* at 1346-47 They also introduced evidence that the protesters had picketed the homes of three facility employees, causing two of the employees to quit. *Id.* at 1346.

acknowledging that RICO "was being applied in contexts far beyond those originally intended,"[16] the court neglected to address directly the "obtaining" element of extortion, even though it was argued by the defense.[17] Instead, the court reiterated that "economic motive" was not a required element for a Hobbs Act violation, a conclusion that was irrelevant and unresponsive to the defendants' argument.[18] Thus, the court clearly confused the defendants' argument that they had not "obtained" any property as a result of their activities with the argument that the defendants had no "economic motive" for their protests.[19]

A careful analysis of the court's reasoning in *McMonagle* does not support its assertion that Hobbs Act extortion requires only a deprivation to the victim, rather than a deprivation and a corresponding "obtaining" or "taking" by the defendant or a related third party.[20] The court's observation, that "a person may violate the Hobbs Act without himself receiving the benefits of his coercive actions,"[21] was inadequate: while the extortionist need not

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[16] *Id.* at 1348 (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499-500 (1985)).

[17] *See* Murray, *supra* note 7, at 726 n. 157.

[18] *McMonagle*, 868 F.2d at 1350.

[19] Interestingly, the issue of "economic motive" was never raised at trial. However, the Third Circuit, confusing the issue of "obtaining" with "economic motive," asserted that the issue of "economic motive" had been raised on appeal. *McMonagle*, 868 F.2d at 1349-50; *see also* Murray, *supra* note 7, at 726.

[20] *See* Murray, *supra* note 7 at 727.

[21] *McMonagle*, 868 F.2d at 1350 (*citing United States v. Cerilli*, 603 F.2d 415, 420 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980)).

personally receive the benefits of his actions, those benefits must accrue, at least, to the extortionist's designee.[22] In affirming the lower court, the *McMonagle* court did not scrutinize the common law elements of extortion[23] and, without citation to persuasive authority or careful analysis, failed to require an "obtaining" of property by **someone** before holding that extortion occurred.[24]

Relying on *McMonagle* and its flawed analysis, the Second Circuit affirmed the Hobbs Act convictions of two

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[22] *See Green*, 350 U.S. at 420.

[23] *See* Murray, *supra* note 7, at 727.

[24] The Third Circuit is not alone in this failure, although it arguably precipitated this lack of meaningful analysis by the lower courts. In *Libertad v. Welch*, 53 F.3d 428, 438 n.6 (1st Cir. 1995), the court, simply citing *McMonagle*, 868 F.2d at 1350, and conducting no meaningful analysis, concluded,

> [T]he record clearly shows that [the defendants] used force (physical obstruction, trespass, vandalism, resisting arrest), intimidation, and harassment of clinic personnel and patients, with the specific, uniform purpose of preventing the clinics from conducting their normal, lawful activities. The record also amply shows that [the defendants'] tactics include the intentional infliction of property damage, and directly result in the clinics' loss of business. **It is difficult to conceive a set of facts that more clearly sets forth extortion as it is defined [under the Hobbs Act].**

The *Libertad* court, in its opinion, never explained or addressed the "obtaining" requirement. Moreover, nothing in the record of the case indicated that the defendants "obtained" anything of which their victims were deprived. *See* Murray, *supra* note 7, at 732. Similarly, in *Palmetto State Medical Center v. Operation Life Line*, 117 F.3d 142, 149 (4th Cir. 1997), the court, in reversing the lower court's finding of liability because of insufficient evidence, never questioned whether the Hobbs Act and RICO were properly applied to abortion protesters who never "obtained" property of which the plaintiff was purportedly "deprived."

abortion protesters who conspired to damage two abortion clinics with butyric acid.[25] In neither instance did the defendants obtain property. The court erroneously concluded that because "property may be tangible or intangible," the defendants obtained property when they "induce[d] abandonment of that [intangible property] right."[26] But this argument is a *non sequitur*. Simply because property is intangible does not mean that petitioners "obtain" such property even if another loses it.

Logically, if the petitioners in this case **obtained** property from the respondents, the respondents have necessarily lost their property. But the converse is not true. Just because the respondents have lost property does not mean that the petitioners "obtained" it. If that were so, any vandalism would also qualify as larceny or theft. Petitioners' vigorous protest, which sometimes may have included the commission of a tort – a trespass – by activists, is not extortion. Petitioners' protest, like much other political expressive conduct, may, in some respects, be coercive, but **it is not extortive**.[27] And to the extent that

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[25] *See United States v. Arena*, 180 F.3d 380 (2d Cir. 1999), *cert. denied*, 531 U.S. 811 (2000).

[26] *Id.* at 394. The *Arena* court defined the property as "the victim's right to conduct a business free from threats of violence and physical harm." *Id.* The court appeared to be confusing the purpose of the Hobbs Act – the protection of the free-flow of commerce – with the elements of the crime under it.

[27] The distinction between extortion and coercion is a significant one. The purpose of the former is the protection of property, the latter the protection of autonomy. The Model Penal Code and the majority of states maintain the distinction between extortion and coercion. *See* G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding, Abetting and*

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it is coercive, it is either constitutionally protected[28] or merely tortious.[29] In either case, petitioners' conduct is not extortive, and, therefore, is an insufficient predicate act to trigger the application of RICO.

Essentially, respondents' theory of extortion is that any garden-variety political protest aimed at an industry causes extortion to the extent that it adversely influences businesses and consumers and involves any unlawful conduct. If businesses sell less, if consumers buy less, if fewer employees are employed, that is "extortion" of each of them. The extorter need **obtain** nothing; it is sufficient if the businesses, consumers, or employees are deprived of (or "give up") something. Under this theory, the very nature of protest supplies the element of "actual or threatened force or fear." During the jury instruction conference, respondents recognized how strained their theory of Hobbs Act extortion was. When the district court inquired whether the respondents' theory of extortion encompassed non-violent trespass, the respondents stated, "Well, first of

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Conspiracy Liability Under RICO, 33 Am. Crim. L. Rev. 1345, 1660-61 nn. 23-31 (1996). Only a minority of states categorize prohibitions of coercive conduct under the same heading as prohibitions on extortion. *See id.* at 1660 n. 27.

[28] *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) ("[s]peech does not lose its protected character, however, simply because it may embarrass others or coerce them into action.").

[29] The evidence recounted by the district judge in his decision suggest that the petitioners or others associated with PLAN had committed only a number of torts: blockading clinic doors, pushing and shoving employees and patients, banging on cars, trespassing into abortion clinics, vandalizing clinics and clinic equipment. *NOW v. Scheidler*, ___ F.Supp. ___, 1999 U.S. Dist. LEXIS 11980 (N.D. Ill., July 16, 1999) (*see* 01-1118 Pet. App. 110a-112a).

all, yes and no. I think for the most part yes."[30] (Jury Instruction Conference Tr. 4335). The respondents went on to admit that "if there were let's say a trespass that was going to destroy the flowerbeds . . . I think a threat of destroying your flowerbeds could be extortion." (Jury Instruction Conference Tr. 4335). Respondents then backed away from this comment but in the end accepted "trampling on flower beds" as sufficient for Hobbs Act extortion.[31] "But there is a line at some point where you're trampling on the flowerbeds and you're smashing the windows or a person might just say, hey, I'm going to close the office today because I don't want to deal with this." (Jury Instruction Conference Tr. 4336). Respondents' slippery interpretation is inconsistent with established case law because it disregards the requirement that petitioners "obtain" property in order to commit the crime of extortion.

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[30] The district court's statement eliciting the response was: "So under your view – I suppose it would be under Mr. Sachnoff's view, the clinics, that **a trespass not involving force or violence**, a peaceful sit-in in the offices of the clinic undertaken in such a way that would prevent the clinic from doing business would be a violation of the Hobbs Act." (Jury Instruction Conference. Tr. 4334-35) (emphasis added).

[31] Plaintiffs suggested that trampling on flower beds probably would not create the requisite reasonable fear. "But the next question you have to look at is the fear reasonable and does it cause whatever the damage is you're talking about. So the answer might be no. So even though a threat – under the Hobbs Act I believe that a threat of any wrongful, unprivileged, unprotected activity designed to make somebody give up a right which reasonably caused them to do that, I think that would be extortion. I don't think stepping on your flowerbeds would meet that standard." (Jury Instruction Conference Tr. 4335).

IV. WITHOUT ANALYSIS, THE COURT BELOW DISREGARDED THE "OBTAINING" ELEMENT BY IMPLICITLY ADOPTING FLAWED "LOSS TO THE VICTIM" REASONING

The Seventh Circuit in this case, as did the trial court, summarily rejected petitioners' argument that they did not "obtain" property.[32] Without additional comment or analysis, the court of appeals erroneously relied on a purported "long line of precedent . . . holding that 'as a legal matter, an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required.'"[33] The court below cited only one case, *United States v. Stillo*, 57 F.3d 553 (7th Cir. 1995).[34]

However, a careful review of *Stillo* and its predecessor, *United States v. Lewis*, 797 F.2d 358 (7th Cir. 1986), *cert. denied*, 479 U.S. 1093 (1987), demonstrates that those cases have also mistakenly linked two distinct legal principles – (1) that an extortionist need not personally benefit from the extortion and (2) that the property of which the victim is deprived need not be tangible – with the erroneous assertion that the gravamen of the crime of extortion is loss to the victim. *Stillo*, 57 F.3d at 559; *Lewis*, 797 F.2d at 364. The court below appears to have based its decision on these flawed analyses.

The Seventh Circuit has previously stated that to "secure a conviction under the Hobbs Act, the prosecution

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[32] *NOW v. Scheidler*, 267 F.3d 687, 709 (7th Cir. 2001).

[33] *Id.* (*quoting United States v. Stillo*, 57 F.3d at 559).

[34] *Id.*

does not have to show that the defendant acted to receive, either directly or indirectly, the proceeds of his extortion or any benefit therefrom."[35] To the extent that this is simply a reaffirmation of the principle that, to support a conviction for extortion, the property **obtained** need not constitute a personal gain or benefit **to the defendant**, this proposition is unremarkable. Clearly, the property or benefit may accrue to a third party designee, as opposed to the defendant. However, the property still must **be obtained** by either the defendant or the defendant's designee. Additionally, the Seventh Circuit has also previously concluded "the 'property' of which the victim is deprived need not be tangible . . . ."[36]

But to say that property need not be **tangible** is not to say that it need not be **property**. Apparently, relying on the conclusion that the "property" need not be tangible, the court below accepted the illogical and made the immense leap to conclude that any loss of rights is a loss to the victim, thereby satisfying the so-called "gravamen" of the offense. This flawed and illogical reasoning leads to the erroneous conclusion that there need be no "obtaining" of property by the petitioners or any related third party. The Seventh Circuit's decision in this case is wrong because it ignores the plain language of the Hobbs Act, the common law, and this Court's holding and analysis in *Evans*.

There is no RICO case here and, despite years of bankrupting litigation, there never has been. RICO

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[35] *Lewis*, 797 F.2d at 364.

[36] *Lewis*, 797 F.2d at 364.

requires valid predicate acts. In this case, the respondents pled extortion under the Hobbs Act.[37] No extortion occurred because no obtaining was ever shown, as required by Congress, the plain language of the Hobbs Act, common law, and this Court's precedent.

These respondents and others similarly situated have adequate remedies for private harms, including trespass and vandalism, available to them under state law. This Court should limit the reading of extortion under the Hobbs Act to its proper meaning.

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[37] The respondents also pled extortion under state law; however, issues related to state law extortion are not before this Court.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

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